1992

Doreen B. Thompson as Conservator for the estate of Theodore Barrett Thompson v. Randall M. Smart, Leon Glenn, Jr., Carma W. Glenn, The Leon Glenn Jr. Trust, Leon Glenn, as Trustee, The City of Hurricane, the State of Utah, and John Does 1 through X : Brief of Respondent

Utah Court of Appeals

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IN THE COURT OF APPEALS

OF THE STATE OF UTAH

DOREEN B. THOMPSON, as Conservator for the estate of THEODORE BARRETT THOMPSON,

Appellant,

vs.

Case No. [redacted] 910500127

RANDALL M. SMART, LEON GLENN, JR., CARMA W. GLENN, THE LEON GLENN JR. TRUST, LEON GLENN, as Trustee, THE CITY OF HURRICANE, a municipal corporation, the STATE OF UTAH, and JOHN DOES I through X,

Priority No. 10

Respondents.

RESPONDENT'S BRIEF

INTERLOCUTORY APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH
HONORABLE J. PHILIP EVES, PRESIDING

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LIST OF PARTIES

The caption of the case on appeal contains the names of all parties. However, Thompson's appeal challenges only the District Court's Order granting Hurricane City's Motion for Summary Judgment.

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I. JURISDICTION

This Court has jurisdiction pursuant to the provisions of Article VIII, Sections 3 and 5 of the Constitution of Utah, Utah Code Ann. §§ 78-2-2(3) and (4) and 78-2a-3(2)(j), and Rule 5 of the Utah Rules of Appellate Procedure.

II. STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

A. Did the District Court correctly rule that under the "public duty" doctrine, Hurricane City had no duty to control a third party's escaped horse?

B. Did the District Court correctly rule that no "special relationship" existed between Hurricane City and Mr. Thompson?

The standard of appellate review for questions of law is correctness. Mountain States Tel. and Tel. Co. v. Garfield County, 811 P.2d 184 (Utah 1991).

III. LAW WHOSE INTERPRETATION IS DETERMINATIVE

No constitutional provisions, statutes, ordinances, rules, and/or regulations are determinative. Rather, the common law "public duty" doctrine is determinative.

IV. STATEMENT OF THE CASE

A. Nature Of The Case And Course Of Proceedings.

Mr. Thompson was injured when his motorcycle collided with a stray horse. The horse was owned by Defendant Smart, and was corralled by Defendants Glenn. The accident occurred in a rural area within the Hurricane City limits on State Highway SR-9.

Less than an hour before the accident, the Hurricane City Clerk was notified that the horse was loose. Although some effort was made to notify the local animal control officer, Hurricane City made no effort to locate, and did not impound the horse prior to the accident.

Mr. Thompson was a member of the general public. Prior to the accident, Hurricane City and Mr. Thompson had no contact with the other concerning the horse. Neither Mr. Thompson nor anyone else took any action in reliance upon any City action or representation regarding the horse's whereabouts or propensities. Mr. Thompson had no knowledge of the stray horse prior to the accident. The City had no knowledge that Mr. Thompson would be in the vicinity of the horse, or that the horse posed any particular threat to Mr. Thompson. The City had no basis to distinguish Mr. Thompson from the public at large.

Mr. Thompson filed a negligence action against multiple defendants, including Hurricane City. Mr. Thompson claimed that Hurricane City had a duty to enforce its animal control ordinances and protect him from the conduct of third persons or their animals. Hurricane City moved for summary judgment on the ground that it owed Mr. Thompson no duty of care. The District Court granted the City's Motion for Summary Judgment on the ground that Hurricane City owed Mr. Thompson no duty of care.

Plaintiff Thompson's interlocutory appeal seeks review of that Order.

B. Statement Of Facts.

1. On July 13, 1990, Barry Thompson was traveling on a motorcycle westbound on State Highway 9 ("SR-9"). At approximately 1700 West State Street in Hurricane City, a horse owned by Defendant Smart was at large and grazing along the north side of SR-9. R. at 2.

2. The horse darted across SR-9 and collided with the motorcycle, resulting in injuries to Mr. Thompson. R. at 2-3.

3. Mr. Thompson does not remember anything about the accident. He had, however, driven through that section of road on many occasions ("thousands of times"), and had driven through it twice within an hour of the accident. Mr. Thompson was aware that livestock could stray onto a road and constitute a hazard to a motorcyclist. He testified that he would look out for livestock and, if he was apprehensive, would slow and perhaps even stop. R. at 405-06 (citing Mr. Thompson's Depo. at 37-41).

4. The eye witness to the accident was also westbound on SR-9 and was passed by the motorcycle. As they approached the accident scene, the Plaintiff was 75-100 yards ahead of the witness. The witness had no difficulty seeing the horse 100 yards away. The horse was on the north side of the road and appeared agitated. The motorcycle never slowed. The horse ran

out in front of the plaintiff's motorcycle and the collision occurred. R. at 407 (citing Mr. McCaul's Depo. at 10-16.)

5. Mr. Thompson sued the horse owner, the persons charged with corralling the horse, the State of Utah Department of Transportation and the City of Hurricane. R. at 1-8.

6. Mr. Thompson alleged that Hurricane City had a duty of care to erect and maintain signs along SR-9 warning drivers of the hazards of driving in an area where domesticated animals run at large. R. at 5.[1]

7. Mr. Thompson also alleged that Hurricane City had a duty of care specifically "to Mr. Thompson to ensure that

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[1]Plaintiff abandoned this claim after discovery on liability and after Hurricane City pointed out in its Motion for Summary Judgment that the roadway on which the accident occurred was a state highway over which the Utah State Department of Transportation had jurisdiction. Plaintiff stated:

> During the course of discovery, Plaintiff learned that, although some horses had been loose in the general vicinity of the accident and that although animals do run at large within the municipal boundaries of Hurricane City, the problem with estray animals in the vicinity of the accident was not as extensive as first supposed. Plaintiff therefore voluntarily moved to dismiss the State of Utah from this action believing that the State was not under a duty to place warning signs for animals. Consistently, Plaintiff does not intend to defend its allegation that the City of Hurricane owed a duty to Plaintiff to maintain signs in vicinity of the accident. Plaintiff does not object to the Court's striking from the Complaint references to Hurricane's duty to maintain signs near the accident scene.

R. at 610-11.

domesticated animals did not run at large on or about the streets of Hurricane City and SR-9." R. at 5.

8. Mr. Thompson alleged that the latter duty arose by Hurricane City Ordinance, and that Hurricane City had a duty to Mr. Thompson to enforce its Ordinances. The City had ordinances making it unlawful for domesticated animals to run at large within the municipal boundaries of Hurricane City,[2] and granting

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[2]Paragraph 3 of Appellant's Statement of Facts combines and rearranges selective portions of two ordinances to come up with a new meaning. Appellant states:

> [U]nder the Ordinance, any "owner or person charged with responsibility for an animal found running at large" was strictly liable for "all damages incurred by anyone whose person . . . ha[d] been injured" by the loose animal "regardless of the precautions taken to prevent the escape of the animal and regardless of whether or not he kn[e]w that the animal [was] running at large."

(Appellant's Brief, ¶ 3, p. 2.)

The Ordinances instead read as follows:

> 2. Animals Running at Large: It shall be unlawful for the owner or custodian of any animal . . . to allow such animals at any time to run at large. The owner or person charged with responsibility for an animal found running at large shall be strictly liable for a violation of this section regardless of the precautions taken to prevent the escape of the animal and regardless of whether or not he knows that the animal is running at large.

R. at 642 (§ 13-247(2)).

> Any person violating the provisions of this ordinance . . . shall be subject to the following:

(continued...)

authority to local officials to impound such animals and otherwise enforce the ordinances.[3] R. at 613, 635-52.

9. On motion of Hurricane City, the District Court ordered that discovery commence and be had on the issue of liability only, so that defendants or some of them could file dispositive motions, and those who were not liable as a matter of law would

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[2](...continued)
3. Restitution of the cost of all damages incurred by anyone who's person, property or animal has been injured or destroyed . . . .

R. at 651 (§ 13-257(3)).

Thus, the "strict liability" imposed by § 13-247(2) was for criminal violation of the Ordinance, not for tort liability, and the restitution identified in § 13-257(3) was a form of criminal penalty or sanction, not tort liability.

Then, in Paragraph 4 of Appellant's Statement of Facts, Appellant selectively uses only a portion of § 13-247(2) to reach the conclusion that a municipal poundmaster somehow qualifies as a person "charged with responsibility for an animal found running at large . . . ." (Appellant's Brief, ¶ 4, p. 3.) Read in full context, however, that Ordinance imposes criminal liability for owners and custodians of stray animals, and not tort liability on the people who are responsible for enforcing the law and impounding estray animals.

[3]The Ordinance created an office of poundmaster, and at the time of Mr. Thompson's accident the chief of police served as ex officio poundmaster because no poundmaster had been appointed. R. at 613, 635. The Ordinance also created a division of animal control within the police department, appointed the chief of police director, allowed the chief of police to receive the assistance of any peace officer or animal control officer as he may designate, and gave the director the charge to enforce animal control ordinances and supervise animal control officers. R. at 613, 639.

not have to incur the expense of conducting discovery on damages. R. at 201-02, 218-19, 223-24.

10. Discovery revealed that Hurricane City first received notice that a horse was loose at approximately 8:30 a.m. the day of the accident. At that time, an unknown motorist passing through the drive-up window at the City offices told Virginia Pectol, the City Clerk, that a horse was loose.[4] The Clerk attempted several times to contact the animal control officer both by phone and radio, but was unsuccessful. In the meantime, the accident occurred. R. at 694-96.

11. Mrs. Pectol, in accordance with established procedure, attempted to contact the animal control officer by calling the Washington County Central Dispatch. She called dispatch two or three times, but the line was busy. She also tried to contact the animal control officer directly by radio and called him at home, but there was no answer. In between, she was attempting to perform her usual functions in the City office. Thus, it is

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[4]Appellant states: "It is reasonable to assume that other people in Hurricane City did not remove Defendant Smart's loose horse because they knew it had been reported to the Hurricane City offices and Hurricane City police had an animal control division that removed large, stray animals." Appellant's Brief, p. 6 n.5. Such an assertion is the wildest of speculation. There is no evidence whatsoever that other people knew the horse was loose, or that it had been reported, or that others would have removed the horse, or that others failed to take steps to remove the horse because it had been reported. Even if such evidence existed, however, it would not place upon Hurricane City a duty to Mr. Thompson to control the conduct of third persons under the "public duty" doctrine.

questionable whether her conduct was in any way unreasonable or negligent, and it is speculative whether prompt contact with the officer would have resulted in a different outcome. For purposes of the Summary Judgment Motion only, however, Hurricane City assumed, arguendo, that Mrs. Pectol could have done more and that it would have made a difference. R. at 404, 694-96.

12. The accident occurred at approximately 9:10 a.m., July 13, 1990. R. at 617.

13. There is no evidence that the Thompsons had any communication with the City or its agents about the horse before the accident. Mr. Thompson's actions prior to the accident were not taken in reliance upon any conduct or representations by any City officer or employee relating to the horse. R. at 404-05.

14. No evidence exists that the City had any notice that Mr. Thompson himself would be in the vicinity of the horse, or that the horse posed a particular threat to Mr. Thompson. In short, there was no notice to the City whatsoever to distinguish Mr. Thompson from the public at large. See R. at 420.

15. On July 30, 1992, the District Court granted the City's Motion for Summary Judgment on the grounds that "the public duty doctrine is applicable to the plaintiffs' claims against the City of Hurricane and that no facts exist from which it could be found than any special relationship existed between plaintiffs and the defendant City of Hurricane." The District Court certified the

Order as final pursuant to Rule 54(b), Utah Rules of Civil Procedure. R. at 788-89.

V. SUMMARY OF ARGUMENTS

A negligence action may be maintained only if there is a duty of care. The existence of a duty is a question of law for the court.

The "public duty" doctrine, which is well recognized in Utah law, bars Mr. Thompson's negligence claim against Hurricane City. The "public duty" doctrine provides that the governmental agency has only a general duty to the public to enforce its laws, but has no such duty to an individual member of the public absent a showing of a "special relationship" between the agency and the individual. The government does not insure against conduct of third persons.

Mr. Thompson cannot establish an exception to the "public duty" doctrine based on a "special relationship" with Mr. Thompson. Under Utah law, Mr. Thompson would have to show (1) inducement by the City and reliance by Mr. Thompson, or (2) that the City had reason to distinguish him from the general public, or (3) that he somehow had set himself apart from the general public. Mr. Thompson could not show any of the three.

Mr. Thompson tries to avoid application of the "public duty" doctrine by arguing that Hurricane City's failure to impound the third party's horse was a breach of a duty to maintain its

physical facilities (i.e., the State road). However, the duty associated with physical facilities is not here implicated; rather, the necessity of controlling the conduct of third persons is implicated. A person has no duty to prevent another from acting negligently absent a custodial relationship. Nor does one have a duty to protect another from the negligent or illegal acts of a third person absent a "special relationship."

VI. ARGUMENT

A. Under The "Public Duty" Doctrine, Hurricane City Owed Mr. Thompson No Duty Of Care.

1. A Duty Of Care Is An Essential Element Of Plaintiff's Negligence Claim Against Hurricane City.

A negligence action may be maintained only if there is a duty or obligation, recognized by law, which requires the defendant to conform to a particular standard of conduct in order to protect another against unreasonable risks of harm. Lamarr v. Utah State Dept. of Transp., 828 P.2d 535, 537 (Utah Ct. App. 1992) ("Establishing the defendant owed the plaintiff a duty of care is '[a]n essential element of a negligence claim'"); Reeves v. Gentile, 813 P.2d 111, 116 (Utah 1991) (elements of negligence include "the defendant owed the plaintiff a duty"); Loveland v. Orem City Corp., 746 P.2d 763, 765-66 (Utah 1987) ("It is axiomatic that one may not be liable to another in tort absent a duty").

As Dean Prosser explained, a "duty" in negligence cases is defined as an obligation to which the law gives recognition and effect to conform to a particular standard of conduct toward another. W. Prosser & W. Keaton, Prosser and Keaton On Torts § 53, 356 (5th ed. 1984). An actor must bring himself within the scope of a definite legal obligation so that it is regarded as personal to him. "[N]egligence in the air, so to speak, will not do." Id. at 357 (citations omitted).

2. The Question Of The Existence Of A Duty Is Solely For The Court.

The existence of a duty is a question to be decided by the court. E.g., Lamarr v. Utah State Dept. of Transp., 828 P.2d 535, 538 (Utah Ct. App. 1992) ("Whether the defendant owed the plaintiff a duty of care is 'entirely a question of law to be determined by the court'") (quoting Ferree v. State, 784 P.2d 149, 151 (Utah 1989)). This means that the court must decide:

> Whether, upon the facts in evidence, such a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of the other--or, more simply, whether the interest of the plaintiff which has suffered invasion was entitled to a legal protection at the hands of the defendant. This is entirely a question of law, to be determined by reference to the body of statutes, rules, principles and precedents which make up the law; it must be determined only by the court.

W. Prosser, Law of Torts § 37, 206 (4th ed. 1971).

3. The "Public Duty" Doctrine Bars Plaintiff's Claim Of A Duty Of Care.

Appellant Thompson asks this Court to abandon or overturn a long history of Utah law and recent Utah appellate court decisions. In a trilogy of recent cases, this Court and the Utah Supreme Court reaffirmed the existence and parameters of the "public duty" doctrine. Ferree v. State, 784 P.2d 149 (Utah 1989); Rollins v. Peterson, 813 P.2d 1156 (Utah 1989); Lamarr v. Utah State Dept. of Transp., 828 P.2d 535 (Utah Ct. App. 1992).

The "public duty" doctrine provides that the governmental agency has a general duty to enforce its laws, but has no such duty to any individual member of the public absent a showing of a "special relationship" between the agency and the individual. The government agency does not insure against conduct of third persons. As this Court explained:

> For a governmental agency and its agents to be liable for negligently caused injuries suffered by a member of the public, the plaintiff must show a breach of a duty owed him as an individual, not merely the breach of an obligation owed to the general public at large by the governmental official.

Lamarr v. Utah State Dept. of Transp., 828 P.2d 535, 537 (Utah Ct. App. 1992) (quoting Ferree v. State, 784 P.2d 149, 151 (Utah 1989)).

The Ferree Court explained the policy for the "public duty" doctrine in the context of a "custodial" case. An inmate, on release from a correction center, had committed murder and the

victim's family blamed corrections officials for not controlling the conduct of a third-party inmate under their charge:

> To adopt plaintiffs' theories would impose too broad a duty of care on the part of corrections officers toward individual members of the public. It would expose the state to potentially every wrong that flows from the necessary programs of rehabilitation and paroling of prisoners. Given the increases in prison populations, the effect could well be to burden corrections officials and chill legitimate rehabilitative programs. Parole and probation programs are subject to occasional tragic failures because of the frailties of human nature and the imprecision associated with predicting violent human conduct, but they are also practically indispensable. The public interest would not be served by imposing liability on corrections officials and the state for the uncertain success that attends parole and probation programs. . . .
>
> Ferguson and the victim were apparently unknown to each other. In short, officials had no duty of due care to the victim apart from their general duty to the public at large.

Ferree v. State, 784 P.2d 149, 151 (Utah 1989).

The Rollins Court confirmed that a state custodian of a mental patient had no duty to protect any specific member of the public from that patient, absent a showing of special relation between the agency and the injured individual. The Court carefully analyzed the doctrine of "special relationship" as an exception to the "public duty" doctrine and found that no such relationship existed:

> In Beach v. University of Utah, 726 P.2d 413 (Utah 1986), . . . we described as essentially pragmatic the approach we would take in dealing with claims that special relationships existed which gave rise to consequent duties:

> Determining whether one party has an affirmative duty to protect another . . . requires a careful consideration of the consequences for the parties and society at large. If the duty is realistically incapable of performance, or if it is fundamentally at odds with the nature of the parties' relationship, we should be loath to term that relationship "special" and to impose a resulting "duty," for it is meaningless to speak of "special relationships" and "duties" in the abstract. These terms are only labels which the legal system applies to defined situations to indicate that certain rights and obligations flow from them; they are "an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection." . . . .
>
> We concluded in Ferree that if the officials had reason to believe that a detainee presented a danger to a particular third person, a special relation, and hence a duty, might be established apart from a generalized duty to protect the public at large. However, we found that no such showing had been made in Ferree.

Rollins v. Peterson, 813 P.2d 1156 (Utah 1989) (quoting Beach v. University of Utah, 726 P.2d 413, 418 (Utah 1986)).

The Rollins Court concluded that because the injured person was not reasonably identifiable to the hospital, or distinguishable from the public at large, no "special relationship" could arise and the hospital owed him no duty. The Court explained pragmatic policy reasons for its conclusion. Absent a reason to believe that a third person under the hospital's charge presented a danger to a particular person (as distinguished from the public at large), imposing liability would

have a crippling effect on custodial programs and would invoke unlimited exposure, making them "virtual insurers" of third parties' conduct: "the duty [proposed] is realistically incapable of performance [and] . . . it is fundamentally at odds with the notions of the parties' relationship." 813 P.2d at 1161-62.

Finally, this Court addressed the "public duty" doctrine in Lamarr, the most recent of the trilogy, and the most closely analogous to this case. In Lamarr, the plaintiff was struck by a car while he was walking east across the North Temple overpass. Prior to the accident, he had walked west across the overpass using a pedestrian walkway that ended under the overpass. He was frightened and harassed by transients who had congregated under the overpass, so on the return trip, he walked along the roadway where he was struck by a car. Among other things, he claimed that the city negligently failed to take affirmative steps to "control" the conduct of third parties--the transient population under the overpass. The District Court granted the city's motion for summary judgment, holding that the city owed Lamarr no private or personalized duty to "control" the transient population and that the city's conduct was otherwise an immune discretionary function under Utah Code Ann. § 63-30-10(1)(a).

Relying heavily on Ferree v. State, 784 P.2d 149, 151 (Utah 1989) and Rollins v. Peterson, 813 P.2d 1156 (Utah 1989), this

Court affirmed the order of summary judgment. The Court explained:

> The public duty doctrine has been defined as "a duty to all is a duty to none." Thus, if the City owed no duty to Lamarr apart from its duty to the general public, Lamarr cannot recover.
>
> The Utah Supreme Court recently explained the parameters of Utah's public duty Doctrine. In Ferree, the court applied the public duty doctrine holding state corrections officials were not liable when a prison inmate on weekend release murdered Dean Ferree. The court concluded the officials had only a general duty to the public, not a private duty to Ferree, and therefore owed Ferree no duty of care. Moreover, in Rollins, the court affirmed the trial court's grant of summary judgment because under the public duty doctrine, the State did not owe a duty to protect the decedent from a state hospital patient. The court specifically noted the decedent "was simply a member of the public, no more distinguishable to the hospital than to any other person."

828 P.2d at 539 (some citations omitted).[5]

Examining the facts before it in light of Ferree and Rollins, the Lamarr Court stated:

> Based on the preceding authority, Lamarr must establish the City owed him a "special duty." We conclude Lamarr

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[5]Lamarr contended that the "public duty" doctrine was abrogated by legislative waiver of certain immunities under the Governmental Immunity Act. This Court, and the Utah Supreme Court, have rejected that argument. The Lamarr Court explained that the "public duty" doctrine is a creature of common law and addresses the issue of the existence of a government agency's duty in the first instance. (The Governmental Immunity Act addresses a conceptually different issue.) Unless a defendant owed a duty of care to the plaintiff, liability cannot attach. If liability cannot attach, there is no need to reach the issue of immunity. Therefore, the Governmental Immunity Act left the "public duty doctrine" undisturbed. 828 P.2d at 539 and n.4 (citing Ferree, 784 P.2d at 152-53).

> has failed to establish the City owed him any duty of care beyond that owed the general public. There is no evidence in the record the City had any reason to distinguish Lamarr from the general pubic. Like the decedent in Rollins, Lamarr "had not set himself apart" from the general public such that any special duty arose between himself and the City. In fact, there is no evidence the City had any knowledge whatsoever of either of Lamarr's trips across the overpass.

Id. at 540.

To emphasize that liability will not attach absent the existence of a special duty to the individual (as distinguished from the general duty to the public), the Lamarr Court contrasted the facts before it with a case in which a special duty had been found to exist. The Court stated:

> This conclusion is also supported by the [S]upreme [C]ourt's decision in Little v. Utah State Division of Family Services, 667 P.2d 49 (Utah 1983). In that case, the court held that once a State agency took custody of an autistic child and placed the child in a foster home, the agency assumed a duty of due care to the child. Id. at 51. It was only after the agency had knowledge of the child's condition and assumed custody of the child, however, that the special relationship arose between the agency and the child. Id.

Id. at 540 n.5.

Similarly, in Stout v. City of Porterville, 148 Cal. App. 3d 937, 296 Cal. Rptr. 301 (1983), quoted in Christenson v. Hayward, 694 P.2d 612 (Utah 1984), the court explained circumstances whereby a special relationship could arise:

> The only additional duty undertaken by accepting employment as a police officer is the duty owed to the public at large. . . .

> Appellants did not allege that [the officer] assured Michael Stout he would take care of him or by his words or conduct induced him to rely on the officer's protection. Appellants did not allege that the officer in any way induced him into a false sense of security. In sum, appellants failed to allege a common law legal duty owed to them by the City and/or [the officer].

Numerous additional cases and authorities hold that under facts similar to those herein, the policy reasons underlying the "public duty" doctrine bar a plaintiff's claims against a government agency. The government is not to be the scapegoat, nor an insurer against a third-party's conduct.[6]

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[6]Owens v. Garfield, 784 P.2d 1187 (Utah 1989) (County owed no duty to child injured by babysitter who was under investigation for abuse); Christenson v. Hayward, 694 P.2d 612 (Utah 1984) (statutory duties to "preserve the peace" and "make all lawful arrests" are owed to public and not to particular individuals; officers not liable for failure to arrest intoxicated motorcyclist who was later killed); White v. State of Utah, 579 P.2d 921 (Utah 1978) (State's failure properly to inspect under OSHA would not create liability; "The legislature . . . had no intention of making [the State] the scapegoat for every industrial accident"); Obrey v. Malmberg, 26 Utah 2d 17, 484 P.2d 160 (1971) (sheriff's failure to investigate burglary not actionable); Carter v. City of Stuart, 468 So. 2d 955 (Fla. 1985) (city was immune from liability for failing to impound dangerous dog that was running at large: "The judicial branch should not trespass into the decisional process of [the executive function in enforcing laws]"); Christopher v. Baynton, 141 Mich. App. 309, 367 N.W.2d 378 (1985) (failure to enforce dog ordinance not actionable); Maxwell v. Audoban Park Comm'n for the City of New Orleans, 482 So. 2d 104 (La. App. 1986) (failure to enforce leash ordinance and reduce stray dog problem not actionable in claim where plaintiff's bicycle collided with dog); Lundgren v. City of McCall, 817 P.2d 1080 (Idaho 1991) (city owed no duty to protect individual plaintiff from illegal fireworks being set off by celebrants, despite fact that officers knew of fireworks and failed to enforce fireworks ordinance); see also 63 C.J.S. Municipal Corporations § 752 ("A municipality is not liable for the mere failure to prevent an act or condition which, in the

(continued...)

4. No Special Duty To Mr. Thompson Existed.

Citing cases from other jurisdictions (Colorado, California, Pennsylvania, Alaska, New York, Kansas), Plaintiff contends that a special relationship arose because the City took some action to notify authorities of the stray horse and thereby "assumed" a duty (where one did not exist before).[7] However, under Utah law, this is not sufficient to establish a special relationship where the Plaintiff was not induced by the City's conduct, in no way relied on the City's conduct, and otherwise did not distinguish himself from the general public. Plaintiff's argument reaches the ironic conclusion that had the City simply ignored altogether any complaint about the stray horse, the City would have had no duty.

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[6](...continued)
exercise of its police power or government functions it might have prevented, as in the case of failure to enact or enforce ordinances"); E. McQuillin, 18 The Law of Municipal Corporations § 53.80 (3d ed. and Supp. 1992) ("it is not liable for failure of policemen to perform their duty to protect private persons or property against a known violation of law. So it is not liable for the negligence of policemen in failing . . . to prevent cattle running at large about the city or town"); cases cited at Annot., Liability of Municipality or Other Governmental Unit For Failure to Provide Police Protection, 46 A.L.R. 3d (1972 and Supp. 1992); cases cited at Annot., Failure to Restrain Drunk Driver as Ground of Liability of State or Local Government Unit or Officer, 48 A.L.R. 4th 320 (1986 and Supp. 1992).

[7]The City's conduct, however, never made it to the "assumption" stage because no effort was actually made to locate or impound the horse.

Appellant cannot establish an exception to the "public duty" doctrine based on a special duty to Mr. Thompson. Utah case law has clearly identified the circumstances by which the special duty exception arises. Mr. Thompson would have to show (1) inducement by the City and reliance by Mr. Thompson, (2) that the City had reason to distinguish him from the general public, or (3) that he somehow had set himself apart from the general public. Ferree v. State, 784 P.2d 149 (Utah 1989); Rollins v. Peterson, 813 P.2d 1156 (Utah 1989); Lamarr v. Utah State Dept. of Transp., 828 P.2d 535 (Utah Ct. App. 1992); Christenson v. Hayward, 694 P.2d 612 (Utah 1984); Little v. Utah State Division of Family Services, 667 P.2d 49 (Utah 1983).

Mr. Thompson was simply a member of the public, no more distinguishable to the City than any other person. No evidence exists that the City had any reason to distinguish Mr. Thompson from the general public, or that he had somehow set himself apart from the general public. Specifically, the City had no notice that Mr. Thompson personally would be in the vicinity of the horse, and had no notice that the horse posed any threat to Mr. Thompson. Mr. Thompson did not communicate with the City concerning the horse; and, Mr. Thompson took no action in reliance upon any specific City action or any City representation of the horse's whereabouts or propensities. The City had no basis to distinguish Mr. Thompson from the public at large. The

City's failure to remedy a condition created by third parties, (such as harassment by transients or a grazing horse along a State highway) does not create a duty specific to an individual. The duty is to the public and not to individuals.

Moreover, Mr. Thompson's proposed duty is "realistically incapable of performance [and] . . . it is fundamentally at odds with the notions of the parties' relationship." Appellant's theory "would impose too broad a duty of care" on cities and towns in this State simply by virtue of their animal control ordinances. It would require that government agencies accurately predict human and animal conduct not under their control. Rural cities and towns would become the virtual insurers of every foot of the miles of stock pens, corrals and fences enclosing livestock located within city limits. It would presumably require the cities to maintain such fences to prevent the escape of any animal, even non-dangerous animals like the horse in this case, or dogs, cats, chickens, etc., any of which could cause a motorcycle accident, without any notice that the animal posed a risk to any particular person.

5. Mr. Thompson Was Not Within A Group Identifiable From The General Public.

Plaintiff also tries to establish a "special relationship" by claiming that although the City had no reason to distinguish Mr. Thompson himself from the general public, he fell within an "identifiable group." Plaintiff misapplies the concept. This

notion arose in the Rollins case, which involved a custodial relationship between a mental hospital and a patient. The mental patient had stolen a car and caused an accident which resulted in another's death, and the Court was faced with defining the added duties arising out of the custodial relationship in light of the "public duty" doctrine.

The Court explained:

> Before any duty is imposed to protect others from bodily harm caused by one under control of the state, the "others" to whom such bodily harm is "likely" and in favor of whom the duty arises must be reasonably identifiable by the custodian either individually or as members of a distinct group. Generally, for a person or group to be reasonably identifiable, the bodily harm caused will be of the type that the custodian knew or should have known the detainee was likely to cause if not controlled. And here we emphasize that the term is "likely" to cause, not "might" cause.

813 P.2d 1156, 1162. In other words, (1) a "custodian"--someone who has responsibility for another--may have a duty to protect a third person from the person under custody if (2) the third person is reasonably identifiable individually or as a member of a "distinct group" and (3) the harm is "likely" to occur--the "detainee" was "likely" to cause that specific harm if not controlled. The Rollins Court concluded that the accident victim was not reasonably identifiable to the custodian either individually or as a member of a distinct group.

In this case, the City did not own the horse and was not responsible for corralling the horse. There was no custodial

relationship between the City and the horse which would impose the added burden on the City to identify Mr. Thompson as a member of a "distinct group" that would "likely" incur harm. That is the only relationship out of which this type of duty could arise.

Moreover, even if the "custodial" standard were to apply in this case, Mr. Thompson was no more identifiable to the City as an individual or as a member of a distinct group than was Mr. Lamarr, who was struck by a car while trying to avoid harassment by transients. Any general member of the public could have been using the roadways at issue or could have been injured in some other way by the horse. Again, as the Lamarr Court explained:

> Lamarr has failed to establish the City owed him any duty of care beyond that owed the general public. There is no evidence in the record the City had any reason to distinguish Lamarr from the general public. Like the decedent in Rollins, Lamarr "had not set himself apart" from the general public such that any special duty arose between himself and the City. In fact, there is no evidence the City had any knowledge whatsoever of either of Lamarr's trips across the overpass.

828 P.2d at 540.

B. Hurricane City's Duty To Maintain Its Physical Facilities Is Not Implicated By The Facts.

Appellant Thompson tries to avoid application of the "public duty doctrine" by arguing that Hurricane City's failure to impound the third party's horse was a breach of some duty to maintain its physical facilities. Plaintiff cites three cases in support of this argument; each, however, involved the failure to

maintain actual physical facilities (i.e., city streets or sidewalks) rather than the control of less predictable third-party conduct. The facts of this case are easily distinguished from those circumstances, and strong policy reasons militate against extending such a duty to the present situation.

In Bowen v. Riverton City, 656 P.2d 434 (Utah 1982), the City had conducted road maintenance but had failed to inspect signs where the work had been done. A stop sign was missing which resulted in an accident. In Ingram v. Salt Lake City, 733 P.2d 126 (Utah 1987), Ingram was injured when he stepped on a defective manhole cover located in an area where the City had undertaken a beautification program. In Trapp v. Salt Lake City, 190 Utah Adv. Rep. 28 (Utah July 7, 1992), a case involving a defective city sidewalk, the Court drew the distinction between maintenance of a physical facility and control of third persons. The Court explained:

> Salt Lake City argues, that it has no duty because it had no special relationship to Trapp. . . . These special relationship cases, however, have no application to the present case. They address whether and under what circumstances one party owes another party a duty to protect that party from his or her own acts or from the acts of a third party. In the special relationship cases, people, not physical facilities, are the things that must be "controlled" if the duty exists. Because people are inherently less controllable than physical things, the common law has imposed no duty to control the conduct of others except in certain circumstances, as where a special relationship exists. . . . The present case does not involve the duty to control an independent actor;

> rather, it involves a duty to maintain physical facilities. . . .
>
> This duty seems generally grounded in the common law principle that one who has control over a physical facility has an obligation to keep it in a safe condition.

Id. at 28-29.

Hurricane City does not quarrel with the proposition that it has a duty to maintain its streets and sidewalks. However, the City should not have a legal duty to prevent someone else from acting negligently. It has no duty to protect one from the negligent or illegal acts of another absent a special relationship.[8] The City's only duty in that context is to the general public under the "public duty" doctrine.

---

[8]See Gray v. Scott, 565 P.2d 76, 78 (Utah 1977) (no duty to foresee criminal acts of third party); Owens v. Garfield, 784 P.2d 1187 (Utah 1989) (no duty to control conduct of third person absent special custodial relationship); Davis v. Mangelsdorf, 138 Ariz. 207, 673 P.2d 951 (Ariz App. 1983) (no duty to control conduct of third person absent special custodial relationship); Nally v. Grace Community Church of the Valley, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988) (no duty to protect another from harm absent special relationship), cert. denied, 490 U.S. 1007 (1989); Leake v. Cain, 720 P.2d 152 (Colo. 1986) (no duty to prevent third party from harming another absent special custodial relationship); Calkins v. Cox Estates, 110 N.M. 59, 792 P.2d 36 (1990) (for duty to arise, plaintiff must show that relationship existed by which defendant was legally obligated to protect interest of plaintiff); Torres v. United States Nat'l Bank of Oregon, 65 Or. App. 207, 670 P.2d 230 (an individual is under no duty to protect another from the wrongful acts of a third party, and may reasonably proceed on the assumption that others will obey the law), rev. denied, 296 Or. 237, 675 P.2d 491 (1983); Cox v. Malcolm, 60 Wash. App. 894, 808 P.2d 758 (no duty to prevent third party from causing physical injury to another), rev. denied, 117 Wash. 1014, 816 P.2d 1224 (1991).

Imposing a duty on the City in this circumstance would go well beyond the standards of the law of negligence and reasonableness and would not be in the interests of justice or public policy. As discussed above, such a standard "would impose too broad a duty of care" on cities and towns in this State simply by virtue of their animal control ordinances. Rural cities and towns would become the virtual insurers of what occurs on its streets, even though caused by the acts or neglect of third parties over whom the City has no control.

VII. CONCLUSION

Unless cities are to become the insurers of the negligent conduct of their citizens, the Order of the District Court granting Hurricane City summary judgment should be affirmed.

DATED this 9 day of February, 1993.

SNOW, CHRISTENSEN & MARTINEAU

By _____
Allan L. Larson
Richard A. Van Wagoner
Attorneys for Defendant
Hurricane City

35\rav\12207.015\brief

CERTIFICATE OF SERVICE

I do hereby certify that on the 9 day of February, 1993 I caused four (4) true and correct copies of the foregoing Brief of Respondent Hurricane City to be served upon the following:

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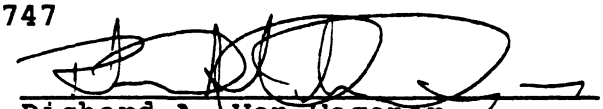

Richard A. Van Wagoner

IN THE COURT OF APPEALS

OF THE STATE OF UTAH

DOREEN B. THOMPSON, as Conservator for the estate of THEODORE BARRETT THOMPSON,

Appellant,

vs.

RANDALL M. SMART, LEON GLENN, JR., CARMA W. GLENN, THE LEON GLENN JR. TRUST, LEON GLENN, as Trustee, THE CITY OF HURRICANE, a municipal corporation, the STATE OF UTAH, and JOHN DOES I through X,

Respondents.

Case No. 920882 CA
Priority 10

(920416/ 910500127)

ADDENDUM TO RESPONDENT'S BRIEF

INTERLOCUTORY APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH
HONORABLE J. PHILIP EVES, PRESIDING

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Defendant/Respondent Hurricane City, by and through its counsel, and pursuant to Utah R. App. P. 24(f), respectfully submits the following Addendum to the Brief submitted on February 9, 1993 in the above-referenced matter, which is that portion of the Record on pages 788-790.

DATED this 18 day of February, 1993.

SNOW, CHRISTENSEN & MARTINEAU

By _____
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Hurricane City

35\rav\12207.015\brief.add

CERTIFICATE OF SERVICE

I do hereby certify that on the 18 day of February, 1993 I caused a true and correct copy of the foregoing Addenedum to Respondent Hurricane City's Brief to be served upon the following:

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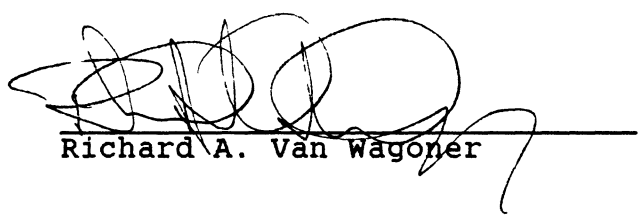

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IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY

STATE OF UTAH

DOREEN B. THOMPSON, as Conservator for the estate of THEODORE BARRETT THOMPSON,

Plaintiff,

vs.

RANDALL M. SMART, LEON GLENN, JR., CARMA W. GLENN, THE LEON GLENN, JR. TRUST, LEON GLENN, as Trustee, THE CITY OF HURRICANE, a municipal corporation, and the STATE OF UTAH,

Defendants.

ORDER AND SUMMARY JUDGMENT

Civil No. 910500127

Judge J. Philip Eves

The Motion for Summary Judgment of the defendant City of Hurricane coming on regularly for hearing before the Honorable J. Philip Eves on July 13, 1992, and the parties having previously filed their respective memoranda of points and authorities in support of and in opposition to the Motion for Summary Judgment, and the Court having ordered the filing and publication of all depositions taken in connection with this matter, and the Court having reviewed the depositions, affidavits, memoranda and pleadings on file herein, and argument having been

heard, and the Court being fully advised in the premises and being of the opinion that the public duty doctrine is applicable to the plaintiffs' claims against the City of Hurricane and that no facts exist from which it could be found that any special relationship existed between the plaintiffs and the defendant City of Hurricane, and good cause otherwise appearing therefor, it is hereby

ORDERED that the motion of the defendant City of Hurricane is hereby granted and it is further

ORDERED that the Court hereby expressly determines that there is no just reason for delay and this Order and Summary Judgment is hereby determined to be a final order and accordingly this Order and Summary Judgment is an express direction for the entry of judgment in favor of the defendant Hurricane City pursuant to Rule 54(b), Utah Rules of Civil Procedure, and it is further

ORDERED that summary judgment is hereby entered in favor of the City of Hurricane and against the plaintiffs, no cause of action, defendant to recover costs.

DATED this 30th day of July, 1992.

BY THE COURT:

J. Philip Eves
District Court Judge

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AFFIDAVIT OF SERVICE

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Gloriann Egan, being duly sworn, says that she is employed by the law offices of Snow, Christensen & Martineau, attorneys for defendant City of Hurricane herein; that she served the attached proposed **ORDER AND SUMMARY JUDGMENT** (Case Number 910500127, District Court of Washington County, Utah) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

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and causing the same to be mailed first class, postage prepaid, on the 16th day of July, 1992.

Gloriann Egan
Gloriann Egan

SUBSCRIBED AND SWORN to before me this 16th day of July, 1992.

Marilyn L. Jones
NOTARY PUBLIC
Residing in the State of Utah

NOTARY PUBLIC
MARILYN L. JONES
[illegible]
Salt Lake City, Utah 84145
My Commission Expires
September 25, 1994
STATE OF UTAH